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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates	)	MM Docket No. 95-92
	)	
47 C.F.R. § 73.658(a), (b), (d), (e) and (g)	)	

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To: The Commission

Comments of Southern Broadcast Corporation of Sarasota

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Summary

The Network Territorial Exclusivity Rule was adopted in its present form for the expressed purpose of fostering the development of local television broadcast services among the several communities of the United States. It does this by permitting local television stations to compete for access to network programs, programs that provide the financial support that makes local news and public affairs programming possible.

Access to the largest communities in the United States is important to broadcast networks. With the establishment of a fourth major broadcast network, competition among networks for VHF affiliates in the largest communities has increased significantly. The major market group owners controlling access to these VHF facilities have begun to negotiate multiple community affiliation agreements that tie affiliations in smaller communities to the result of affiliation negotiations in the larger communities. This type of negotiation threatens independently owned network affiliates in all but the largest communities.

Viewers in smaller communities suffer when network affiliation decisions in their communities are based upon a network's need for access to stations in larger communities. The networks have, in fact, entered into affiliation arrangements where free, over-the-air network service to smaller communities has actually decreased. The Network Territorial Exclusivity Rule should be amended to strengthen its ability to protect the public in smaller communities. This can be done by (a). ensuring that the rule applies to networks, as well as to stations affiliated with networks; (b). establishing certain factual scenarios as prima facie evidence of a rule violation; and (c) by providing prompt discovery opportunities to parties establishing prima facie violations of the rule.

Comments of Southern Broadcast Corporation of Sarasota

1. Southern Broadcast Corporation of Sarasota ("SBC") submits the following Comments in response to Notice of Proposed Rule Making, FCC 95-254, released June 15, 1995 ("NPRM"), instituting this proceeding. The NPRM proposes to revise a number of sub-sections of Rule 73.658 to account for changes in the "market for delivered video programming." Most of these rules relate to the ability of broadcast licensees to accommodate a network's need to obtain clearances for network programs. While SBC perceives no pressing need to change these rules governing networks demands for affiliate air time, these rules could likely be changed without draconian results. This is not the case, however, with respect to the Network Territorial Exclusivity Rule, 47 C.F.R. § 73.658(b).

2. Unlike the other rules subject to the NPRM, the Network Territorial Exclusivity Rule does not regulate a demand networks make upon affiliates. It controls competition among affiliates for access to network programs. SBC submits that the access to network programs permitted (but not required) by the Network Territorial Exclusivity Rule is absolutely essential to the preservation of local over-the-air television transmission service in smaller communities.

3. Recent events show that competition among stations for network programs has changed dramatically, with group owners using the market power of their major market VHF affiliates to influence network affiliation decisions in smaller communities. Networks have changed the entire way they evaluate affiliations. The viewing public in smaller communities can no longer be confident of the availability of free, over-the-air network programming. In short, network affiliates in smaller communities are in danger and this poses a real threat to free, over the air local television in those communities. The magnitude of this existing danger will dramatically increase with the

increase in the number of stations a group owner can own, and if unchecked will threaten the very existence of small community network affiliates and these stations will become endangered species. Without the intervention of the FCC through the Network Territorial Exclusivity Rule, in <u>at least</u> its present form, smaller community network affiliate television stations will become extinct like the dinosaurs. The result will be a net loss of free, over-the-air local television service to viewers in small communities in contravention of the mandate of Section 307(b) of the Communication Act of 1934, as amended.

<u>Station WWSB, Sarasota, Florida</u>

4. SBC is the licensee of Station WWSB, Channel 40, Sarasota, Florida. WWSB has been the ABC television network affiliate in the Sarasota ADI since 1971[1]. It is one of two ABC affiliates in the Tampa-St. Petersburg DMA, the other ABC affiliate being WFTS-TV, Channel 28, Tampa[2]. WFTS-TV is in the Tampa- St. Petersburg ADI. Prior to 1994, WTSP, Channel 10, Tampa served as the ABC affiliate on the Tampa- St. Petersburg ADI. The WWSB service area overlaps with both WTSP and WFTS.

5. WWSB has the only daily scheduled free, over-the-air local television news in Sarasota. During the year ending July 1994, WWSB broadcast a total of 4,645 local news stories, an average of twelve local stories a day. This contrasts with the Tampa-St. Petersburg ADI stations

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[1] ADI is shorthand for Area of Dominant Influence. It was the television market definition used by Arbitron Ratings Company. A description of Arbitron's methodology used for defining ADIs is appended hereto as Exhibit 1.

[2] DMA is shorthand for Designated Market Area. It is the television market definition used by Nielsen Media Research. A description of Nielsen's methodology used for defining DMAs is appended hereto as Exhibit 2.

which, by and large, do not carry any meaningful local Sarasota area news.[3] WWSB also provides the Sarasota area with its only accurate over-the-air local television weather reporting, including reports on such emergency conditions as hurricanes and tropical storms.[4] It continuously airs public affairs programming and public service announcements for community events, projects and public awareness throughout the Sarasota area. During the year ending July 1994, Station WWSB aired over 1900 local public service announcements.

6. Station WWSB's principal community, Sarasota, has an identity separate and distinct from that of the Tampa/St. Petersburg area. This fact accounts for the lack of Sarasota news on the Tampa/St. Petersburg stations. According to the 1995 Rand McNally Road Atlas, Sarasota is 57 miles distant from Tampa. The U.S. Bureau of the Census assigns Sarasota County to the Sarasota-Bradenton Metropolitan Statistical Area (MSA). This is a separate MSA from Tampa and St. Petersburg.[5] Residents of Sarasota, Bradenton, Venice and other communities in the Sarasota-

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[3] See, e.g. Petition for Special relief to modify the Tampa-St. Petersburg Television Market, FCC File No. CSR-3975-A, filed June 24, 1993. Therein, Stations WTVT-TV, Tampa, WFLA-TV, Tampa, WTOG-TV, St. Petersburg, and WFTS-TV, Tampa, Florida sought to modify their respective television markets to include Sarasota County, Florida. Each station, as part of the showing in the petition, discussed its programming service to Sarasota County. Station WTVT-TV claimed the largest amount of Sarasota news broadcast, boasting of nine stories per week. Station WFLA-TV identified 21 Sarasota news stories broadcast over a two year period. Neither Station WTOG-TV nor Station WFTS-TV identified any news programming serving Sarasota.

[4] Weather is a local phenomenon. Tampa weather is markedly different from weather 57 miles away in Sarasota. During severe weather, when cable television service can be interrupted, Station WWSB continues to provide free over-the-air weather broadcasts and emergency information to viewers with electrical power and to viewers with battery powered television. This service is greatly appreciated by residents throughout WWSB's service area, as demonstrated by the letters appended hereto as Exhibit 3.

[5] According to the Census Bureau, "The general concept of a metropolitan area (MA) is one of a large population nucleus, together with adjacent communities that have a high degree of

Bradenton MSA do not identify themselves with the Tampa area.[6]

7. Despite outstanding local over-the-air television service by WWSB over the last 23 years, local network television service to Sarasota, Florida was almost extinguished last year as a result of network negotiations for affiliations in Detroit, Michigan and Cleveland, Ohio. Specifically, on June 16, 1994, George Newi, ABC's Executive Vice President for Affiliate Relations, telephoned Stanley Crumley, General Manager of Station WWSB and informed him that ABC was going to withdraw Station WWSB's network affiliation.[7] According to Mr. Newi, he informed Mr. Crumley that "ABC and Scripps [Howard Broadcasting Company] had entered into affiliation agreements for five markets and that WFTS in Tampa was part of the deal with Scripps." Mr. Newi said that "... since WFTS substantially duplicates WWSB's signal, ABC had decided to disaffiliate WWSB."[8]

8. While it is true that the WFTS signal overlaps, in part, the WWSB signal, it is also true that the ABC decision to disaffiliate Station WWSB, would have withdrawn existing over-the-air network service of Grade A or better quality from 62,709 persons residing in 718 square kilometers of Sarasota County. This corresponds to a loss of Grade A network service to 22.6 percent of the County's population and 48.5 percent of the County's land area.[9] Moreover, disaffiliation of WWSB

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economic and social integration with that nucleus." Metropolitan statistical areas (MSAs), such as the Sarasota-Bradenton MSA, "are relatively free standing MAS and are not closely associated with other MAs." See U.S. Bureau of the Census, 1990 Census of Population and Housing Summary of Economic and Housing Characteristics Florida (1992) at pp. A-8 and A-9.

[6] Numerous residents of the Sarasota area have written the Commission to explain this fact. A number of their letters are appended hereto as Exhibit 3.

[7] See Declaration of Stanley B. Crumley appended hereto as Exhibit 4.

[8] See Declaration of George H. Newi appended hereto as Exhibit 5.

[9] See Declaration of Louis R. DuTreil appended hereto as Exhibit 6.

would have deprived ABC's national network news of its dominant position in the Sarasota market.[10] Quite clearly this dominance was obtained on the basis of the lead in audience generated by Station WWSB's local news.[11] In fact, at the time of WWSB's threatened disaffiliation, ABC national network news was rated first in Sarasota and third in Tampa-St. Petersburg.

9. ABC's decision to disaffiliate Station WWSB was a significant departure from past network practices regarding signal overlap and loss of service. Arnold Marfoglia, former ABC Vice President of Affiliate Financial Affairs, noted that during his tenure at ABC, the network had a

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[10] See Exhibit 7, Attachment, Nielsen Station Index May 1994. Special Report Sarasota Florida. This report showed ratings for the network news in Sarasota, Florida as follows:

		Rating	Share
ABC-	(WWSB)	17	32
	(WTSP)	4	7
	Total ABC:	21	39
CBS-	(WTVT)	8	16
NBC-	(WFLA)	8	16

[11] According to the Nielsen May, 1994 Report, WWSB dominated the 6:00 - 6:30 p.m. local news and delivered that audience to ABC national news at 6:30 p.m. in Sarasota:

6:00 - 6:30 p.m. Local News (Monday through Friday):

	Ratings	Share
WWSB	18	35
WTSP	1	2

6:30 p.m. - 7:00 p.m. National ABC News (Monday through Friday):

WWSB	18	34
WTSP	4	7

prohibition against downgrading affiliations in terms of coverage and network audience.[12] Mr. Newi's stated reason for Station WWSB's disaffiliation, signal duplication, was also at odds with past ABC practices. Mr. Marfoglia had the following observations on the impact of signal duplication upon network operations:

> During my tenure at ABC, I was involved in many discussions regarding affiliate duplication of service areas. The duplication itself was never a cost problem since the network could adjust for any cost that may be incurred by lowering or eliminating compensation. Any other cost associated with network service was insignificant and never played a role in network affiliation decisions. Since the advent of satellite delivery of network programs, the cost of delivering programs to an additional affiliate is negligible and the extra administration costs of maintaining overlapping affiliations are of no consideration. Furthermore, duplication of coverage area, in fact, has potential benefits to the network. Specifically, duplication tends to increase network audience since the viewer has two choices of which stations to watch the network on and therefore, the viewer can make a determination based on general reputation of the local station, local news and other syndicated programming the station may carry. Thus, duplication historically has not been a detriment to the network, since the network receives credit for viewers on both stations. The Network provides compensation as a direct incentive to an affiliate to carry its network programming and support the network in general. [13]

Mr. Marfoglia also confirmed the importance of Station WWSB's local news as a lead into ABC's network programming, stating:

> In affiliating with Station WFTS, Channel 28, Tampa and disaffiliating with Station WTSP, Channel 10, St. Petersburg and Station WWSB, Channel 40, Sarasota, ABC lost the lead in audience generated by the strong local news programs in both stations. In contrast, Station WFTS has no significant local news presence. Therefore, contrary to past ABC network practices, ABC disregarded the critical significance of local news as a lead into network news and programming. This conclusion is strongly supported by the ratings data for network news reported in the May 1994 Nielsen Station Index, Tampa - St. Petersburg, Florida Metered Market

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[12] Mr. Marfoglia worked for American Broadcasting Company from 1963 to 1993. From 1986 to 1993 he was Vice President of Affiliate Financial Affairs. See Declaration of Arnold Marfoglia appended hereto as Exhibit 7.

[13] Id.

> Service and in the May 1994 Nielsen Station Index, Special Report, Sarasota, Florida . . . . ABC's dominance in network news in Sarasota is the result of WWSB's strong local news.

10. The prospect of losing Station WWSB's network affiliation was nothing less than catastrophic for SBC. Lost network programs would have to be replaced with significantly less attractive syndicated programs. Instead of receiving network compensation for carrying programs, WWSB would have to pay considerable sums for entertainment programs. As a result of the lost network programming, the station's advertising revenue would be dramatically and substantially reduced. With program expenditures up and revenues down, the station's diminished resources would not be available for the local news coverage of the Sarasota area, the station's community of license.

11. SBC's concern at the impending loss of Station WWSB's affiliation and the resulting impact on local free, over-the-air news programing was shared by viewers, advertisers, government, civic and charitable organizations and others throughout the Sarasota area. At SBC's request, these local viewers wrote to the Commission and explained that the Sarasota, Bradenton, Venice and Longboat Key and the numerous surrounding communities are not part of the Tampa area and thus not covered by the Tampa and St. Petersburg television stations. They wrote of the need for local news and information relating to events in their communities. Government officials wrote of the assistance of WWSB's local television provides in communicating with citizens on matters of local importance. Charities wrote of their need to access local television for fund raising. Local business wrote of how local television helped them advertise to customers within their communities on a cost efficient basis since local businesses cannot afford to pay significantly higher advertising costs charged by Tampa - St. Petersburg stations to reach local consumers in and around Sarasota. Large numbers

of writers described the pressing need for accurate local weather information throughout Station WWSB's service area and their inability to rely on Tampa area weather forecasts.[14]

12. On July 7, 1994 SBC filed a petition with the Commission arguing that Station WWSB's disaffiliation was prohibited by the Network Territorial Exclusivity Rule. ABC and Scripps denied such a violation. Fortunately, a settlement was entered into whereby ABC withdrew its termination notice and SBC remained an ABC affiliate.[15] In connection with this settlement, SBC requested dismissal of a number of pleadings filed against Scripps and ABC. The Commission approved the ABC/SBC settlement and dismissed SBC's pleadings.[16]

13. Notwithstanding the ultimate resolution of the WWSB affiliation, the cost to SBC of the **mere notice** of disaffiliation was substantial. Apart from the tens of thousands of dollars SBC spent in litigation before the FCC, WWSB lost approximately $1,100,000 in net revenues in only nine months due to lost advertising sales. Long term advertisers withdrew their historical support of the station in anticipation of the station losing its network programming.

14. The loss of a $1,100,000 of revenue would have been a drop in the bucket if the

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[14] See letters attached hereto as Exhibit 3.

[15] SBC is relating the facts of its noticed disaffiliation and submitting various Sarasota area viewer letters solely for evaluation in the FCC's quasi-legislative prospective rulemaking process. SBC does not seek to re-litigate any issue and therefore does not intend these comments to be construed as a complaint against either ABC or Scripps. Nor does it seek any claim or adjudication against ABC or Scripps or anyone else with respect to these matters. In SBC's opinion, taking into account the Settlement Agreement, the record raises no substantial and material question that would require or warrant further inquiry into whether ABC or Scripps entered into a contract, agreement or understanding in violation of the Network Territorial Exclusivety Rule or whether ABC, Capital Cities/ABC or Scripps is qualified to hold broadcast licenses or control broadcast licenses.

[16] See letter to Matthew L. Leibowitz and Joel Rosenbloom, FCC File No. BTCCT-941021KG (July 14, 1995).

station actually lost its ABC affiliation. Management estimated that an additional $ 3,500,000 of revenue per year would have been lost if the affiliation was not reinstated and programming costs would have escalated by at least $ 600,000 per year. The net impact of these financial reverses would have been the loss of regular over-the-air, free local television news programming for Sarasota and its surrounding communities.

Station WTVK, Phoenix, Arizona

15. While the Network Territorial Exclusivity Rule afforded SBC a measure of relief with respect to the disaffiliation of WWSB, it failed to prevent the disaffiliation of Phoenix, Arizona's top-ranked television station, KTVK.

16. In May 1994, KTVK, Channel 3, Phoenix, Arizona had been an ABC affiliate for almost 40 years. It was the top-ranked television station in its market and was in the process of renewing its ABC network affiliation for five years. The only issue remaining on the renewal was the amount of network compensation to be paid to the station. On May 31, 1994 George Newi of ABC called William Miller of Media America Corporation and withdrew ABC's offer of an affiliation renewal for Station KTVK. Mr. Miller called Mr. Newi's superior, Robert Iger, and asked him to explain what was going on. Mr Iger told Mr. Miller that Scripps wanted the ABC affiliation in Phoenix and would switch to CBS in Detroit and Cleveland unless they received an ABC affiliation for Phoenix.[17]

17. On June 2, 1994, William Miller met with Thomas Murphy, Chairman and Chief Executive Officer of Capital Cities/ABC, Inc. to discuss prospects for Station KTVK retaining its

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[17] See Declaration of William Miller appended hereto as Exhibit 8.

ABC affiliation. Mr. Miller recounted his conversation with Mr. Murphy as follows:

> He talked about the kind of hit that the network was facing if it lost its affiliates in Detroit and Cleveland. He said that Scripps Howard was adamant about Phoenix. He said that Scripps Howard had made it clear that Phoenix must be part of the deal if Scripps Howard was to stay with ABC in Detroit and Cleveland. He said that he wanted to save our affiliation if he could but that we need to understand that we [ABC] were in serious jeopardy. He said that the loss of Cleveland and Detroit would be very hurtful to ABC and that Scripps Howard was very clear about its threats. He said that he had told Scripps Howard that he would give in on Tampa... He said that he did not want to give in to Scripps Howard on Phoenix even though Scripps Howard was demanding it.[18]

18. On June 7, 1994, Mr. Miller had a conversation with ABC Vice President, Bryce Rathbone, that illustrated the type of pressure Scripps was placing on ABC to obtain the Phoenix affiliation. Mr. Rathbone told Mr. Miller:

> "I hope they don't have to pull [the affiliation] on you guys but Scripps has a gun to their head. It would cost us half a rating point on Jennings if we lose Cleveland and Detroit . . . I think Iger really wants to keep Phoenix. I don't think Murphy believes he has any choice. Scripps is pushing him hard and if he is forced, he will give up Phoenix."[19]

19. Subsequently, Thomas Murphy told Mr. Miller that he had even offered Scripps $25 million "to take Phoenix off the table" but Scripps would not accept this offer.[20] In the end, ABC acceded to Scripps demands and disaffiliated KTVK to affiliate with Scripps' UHF television station in Phoenix.

20. Media America Corporation attempted to preserve Station KTVK's ABC affiliation

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[18] See Declaration of William Miller at p. 14.

[19] Id. at p.16.

[20] Id. at p.18.

by invoking the Network Territorial Exclusivity Rule in a petition to the FCC. In response thereto, ABC and Scripps did not deny that a multi market agreement was the cause of the disaffiliation of KTVK. While the Commission staff reaffirmed that the purpose of the Network Territorial Exclusivity Rule was to give stations the "maximum opportunity" to compete for network programming, it denied the KTVK petition on April 17, 1995, because "[t]he territorial exclusivity rule has not been applied in the past to protect distant market stations' affiliations . . ." See Eugene F. Mullin, 10 FCC Rcd 4416, 4417 (Mass Media Bureau 1995).

The "New World" of Network-Affiliate Negotiations

21. In 1988, the Commission speculated that the Network Territorial Exclusivity Rule may no longer be necessary since "it appears that the intent of the networks is to maximize the coverage of their programming."[21] In the network/affiliate environment of 1988, the Commission's speculation may have been accurate. Arnold Marfoglia gave the following description of the ABC affiliation procedures in place through 1993:

> During my tenure at ABC, affiliate evaluations were conducted pursuant to guidelines issued by ABC Legal Department. The Legal Department's affiliation principles included the prohibition against downgrading affiliations in terms of coverage and network audience. In addition, each affiliation stood on its own to protect the Network from downgrading its audience in one market as a result of a multiple station owner's leverage using the other markets. The Network would always consider moving to a VHF station from a UHF station, but never voluntarily consider moving from a VHF station to a UHF. Under no circumstances would the Network voluntarily move from a VHF station to a UHF station if it would lose circulation or potential

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[21] See Programming Exclusivity in the Cable and Broadcasting Industries, 3 FCC Rcd. 6171, 6177 (1988).

audience.[22]

22. The question arises then, what fundamental changes have occurred in the network/affiliate bargaining process that could have caused ABC to accept reductions in its network coverage in Phoenix and initially in Sarasota? In Mr. Marfoglia's opinion, based upon twenty-three years of affiliation experience with ABC, the driving force behind ABC's otherwise unprecedented affiliation decisions in Phoenix, St. Petersburg and Sarasota was ABC's need to retain Scripps Howard's VHF affiliates in Detroit and Cleveland. ABC essentially traded the affiliations held by KTVK, in Phoenix, by WTSP, in St. Petersburg, and WWSB in Sarasota, to Scripps Howard in exchange for a long term affiliation agreement with Scripps' Detroit and Cleveland VHF stations. The Phoenix and Tampa affiliations with Scripps Howard would never have occurred without linkage to network affiliations in Detroit and Cleveland. At least with respect to Phoenix, ABC and Scripps agree with Mr. Marfoglia's analysis. See Eugene F. Mullin, supra.

23. To truly understand the existing dynamics of the new affiliation marketplace, we must go back to 1987. In 1987, Fox Network operated the fourth over-the-air, free television network with 98 affiliates. Almost all of these stations were UHF. The Fox Network grew, but lacked comparable national coverage with ABC, CBS, and NBC.

24. With the introduction of the fourth over-the-air, free television network, the availability of VHF stations overall, and in particular in major markets, became acute. In fact, the NPRM makes note of the scarcity of VHF stations by recognizing that "in only 4% of the DMA

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[22] See Declaration of Arnold Marfoglia at p. 2.

markets (serving 17% of television households in the U.S.)" are there at least four VHF stations.[23] Unfortunately, not all DMA's are equal in their impact on the networks, and clearly the need for VHF stations in major markets is even more significant. The best evidence for this is the bidding war between CBS and ABC for Cleveland and Detroit. One of ABC's objectives, preserving a half point on the ABC Nightly News, represented millions of dollars of network revenue.

25. Another measure of how critical network access to VHF stations is in major markets is the New World-Fox marriage. In early May, 1994, Fox Television Network reached an agreement with New World Communications Group for affiliations with twelve VHF television stations owned by New World. To accomplish these affiliations, Fox paid $250,000,000 and loaned New World an additional $250,000,000 on an interest-free basis to become a minority partner in New World. Eleven of these New World stations were in the top 50 television markets. A number of these new Fox affiliates were located in television markets that lacked a sufficient number of VHF outlets to accommodate all four major television markets. This meant that in several major television markets, including Detroit and Cleveland,[24] one or more of the major networks would be without a VHF television outlet.[25] This began a network television version of the children's game, musical chairs.

26. After the Fox/New World deal noted above, the next chorus of network-affiliate musical chairs was in Detroit and Cleveland. Scripps demanded Phoenix and Tampa affiliations in exchange for network access to its Detroit and Cleveland VHF stations. To preserve its VHF affiliate

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[23] NPRM at p.8.

[24] Under the Arbitron system of defining television markets, Detroit was the ninth largest television market. Cleveland was the twelfth ranked television market.

[25] See "Fox and New World Order," Broadcasting and Cable, May 30, 1994 at pp. 6-8, appended hereto as Exhibit 9.

in Phoenix, ABC offered to pay Scripps $25,000,000. In the end, that was not enough. Ultimately to preserve access to the much more valuable VHF stations in Detroit and Cleveland, ABC gave up its VHF affiliates in Phoenix and Tampa, and dramatically increased network compensation to Scripps by millions of dollars each year.[26]

27. Accordingly, the Commission must recognize the dramatic changes in the dynamics of a network-affiliate negotiation. Group owners with VHF affiliates in major markets now hold immense leverage over networks. To achieve some level of parity with this new leverage, networks have not only dramatically revised network compensation, but they have also yielded to multi-market affiliation negotiations.

Access to Major Market VHF Stations is Critical for National Television Networks

28. The premium Fox and the other major networks placed upon securing top market VHF affiliates is explainable by two facts. The first is that the distribution of U.S. television households is skewed very heavily towards the top television markets. The second fact is that VHF television stations have significant transmission and reception advantages over UHF television stations.

29. The distribution of U.S. television households is illustrated by the table appended hereto as Exhibit 11.[27] The first ten television DMAs account for 28,803,000 television households or thirty percent of the nation's television homes. The first fifty television DMA's contain two thirds

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[26] Attached as Exhibit 10 is the Scripps' Master Affiliation agreement.

[27] This table was prepared from data listed in Television Yearbook, BIA Publications, Inc. (1995), pp.1-211.

of the nation's TV households. This leaves only one third of the county's television households distributed among the remaining 161 television DMA's. Accordingly, access to the top 50 markets is critical to networks. Thus, smaller markets are no longer evaluated on an individual basis but have become pawns to be traded away to protect access to larger markets.

30. Some of the competitive advantages enjoyed by VHF stations are reviewed in "Survey of Factors Affecting Television Competition" appended hereto as Exhibit 12. A dramatic illustration of these differences between UHF and VHF broadcasting is found in a report prepared September 1980 by Louis Harris and Associates, Inc., for the Commission's UHF Comparability Task Force. This report, <u>A Survey of Consumer Attitudes and Experience Regarding UHF Television</u>, found:

> Among VHF stations, a Grade A predicted signal strength is tantamount to reception. Virtually all (97%) of VHF stations with Grade A predicted signal strength are reported to be received by viewers in these communities. By contrast, only 47% of UHF channels that meet Grade A criteria are received by viewers in these communities. Similarly, although 61% of VHF stations with Grade B signals are received, only 22% of UHF stations with Grade B signals are reported as received by local viewers. <u>These findings indicate that VHF stations with a Grade A signal are more than twice as likely to be received as UHF stations with a Grade A signal</u>. The difference in reception between VHF stations and UHF stations with Grade B predicted signal strength is nearly 3-to-1 (61% to 22%).
>
> Similarly, there is a huge disparity in the picture quality received on UHF and VHF channels that fall within the same signal strength contour. Among stations with Grade A signal strength, we find that 79% of VHF channels, as compared with 28% of UHF channels, are rated as having good or excellent picture quality. The disparity between VHF and UHF reception is even more pronounced in channels with Grade B signal strengths, where 37% of VHF stations and only 10% of UHF stations are rated as having good or excellent picture quality.

<u>Id</u>. at pp. 246-247.

31. Differences in over-the air coverage of UHF and VHF stations remain important to the 1/3 of US television households that do not subscribe to cable television. Even in cable homes,

not all viewing is done on television sets connected to the cable system. Moreover, in certain emergency situations, like Hurricane Andrew, cable television fails and may not be restored for months. In such circumstances over-the-air television is the only television service to affected areas.

32. SBC submits that even cable carriage does not equalize UHF/VHF competition. VHF stations occupy the most favorable channel positions on a cable system while UHF stations are more difficult for viewers to locate among the upper band cable channels. The 1972 Significant Viewing list gives established VHF stations carriage advantages vis-a-vis UHF stations. Most UHF stations were not in existence in 1971 when the surveys for the Significant Viewing list were taken. In fact the surveys occurred only six years after the FCC's rules requiring UHF tuners in all TV sets went into effect. See All-Channel Television Receiver Rules, 24 RR 1585 (1962). Needless to say the list is weighted heavily in favor of VHF distant viewing.

Access to Network Programming Remains Critical to Smaller Stations' Economic Viability

33. The distribution of television households and the competitive advantages of VHF television explain the networks' behavior in the new affiliation marketplace. What accounts for the intense competition among stations for network affiliations? This competition would be unnecessary if, as the NPRM believes "there is now an array of new network and non-network sources of programming."[28] The fact is there are great variations in the ability of programs to attract audiences and the programs that consistently attract the largest audiences are network programs.

34. The superior attractiveness of network programs accounts for the intense competition among stations for network affiliation. The October 23, 1995 issue of Broadcasting and Cable

[28] NPRM at p.9.

magazine illustrates this superiority. On pages 30, 32, and 62 Broadcasting and Cable reported on the top syndicated, television network and cable network shows. The top television network program had a 24.7 rating and a 40 share. The top syndicated program had a 10.7 share. The top cable network program had a 4.9 rating. The programming discussion appended hereto as Exhibit 13 confirms that broadcast network television shows consistently attract much greater audiences than other programs. This has important implications for smaller communities that hope to have a local television transmission service.

35. When television viewers in smaller communities cannot obtain network programs over-the-air from free local television stations, they obtain network programs elsewhere. This can be done by distant viewing of network affiliated television stations licensed to larger communities.[29] Cable television can also bring viewers the network signals from distant stations. Either way local stations lose the local viewers who would otherwise be the basis for advertiser support of the smaller community's local television outlet. Deprived of network programs, a smaller community's local television station must pay syndicators for entertainment programs to present in its service area. The cost of numerous syndicated programs is an expense not incurred by network affiliates. To make matters worse, even the best syndicated programs do not attract the size audience produced by network programs. In short, independent television stations licensed to smaller communities pay significant sums to present fifth rate programs that attract small audiences. They cannot generate the type of revenues that could support regularly scheduled quality local news for their smaller communities. If free over-the-air local television news is to survive in smaller communities, stations

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[29] VHF stations in distant communities can be viewable over distances in excess of one hundred miles, assuming the viewer invests in the necessary receiving equipment.

licensed to those communities must have access to network programs.

<u>The Network Territorial Exclusivity Rule Is Inadequate to Protect Local Television Service in Today's Marketplace</u>

36. The rule that helped Station WWSB retain its Sarasota network affiliation and did little to protect Station KTVK's affiliation in Phoenix states, in pertinent part:

> No license shall be granted to a television broadcast station having any contract, arrangement or understanding, express or implied, with a network organization... which prevents or hinders another broadcast station located in a different community from broadcasting any program of the network organization... As employed in this paragraph, the term "community" is defined as the community specified in the instrument of authorization as the location of the station.[30]

The present version of this rule was adopted specifically to foster the development of local television service. In taking this action, the Commission stated:

> At this stage in the development of the television industry, network programming is essential to the profitable operation of most stations; and, in many instances, its availability may be determinative of a station's ability to survive and furnish a needed television service to the public. The obtaining of network programs is such a vital and valuable asset to stations that we believe maximum opportunity should be given to all stations to compete for network programming, and that any of our Rules which might operate to restrain competition among stations for network programming should be kept to the minimum required to protect the public interest and to insure good program service to the public. We are of the view that the present restriction in our Rules which operates to preclude stations in other communities from contracting with networks for particular network programs when a station with overlapping coverage in another community has contracted for "first call" on the same network programs is unduly

[30] <u>See</u> 47 U.S.C. § 73.658(b).

> restrictive on competition for network programming and is not conducive to the rapid and effective development of television service to the public.

See Revision of Territorial Exclusivity Rule, 12 RR 1537 1541-42 (1955).

37. In the forty years that the Network Territorial Exclusivity Rule has existed in its present form, there has been no threat to the availability of network programs comparable to that posed by the new practice of negotiating multi-community long term network affiliation agreements. The effects of these agreements is to destroy fair competition among would-be network affiliates for access to network programs in smaller communities. And by smaller, we don't mean small. Phoenix, Arizona is not small. It is the 19th ranked DMA, with 1,133,000 television households. It simply does not have the combined number of television households of Detroit (1,748,000 TVHH) and Cleveland (1,460,000 TVHH).

38. Only the affiliations held by the largest group owners of major market television outlets are unaffected by the new elements introduced into local competition for network affiliations by large group affiliation deals.[31] In the competition for network affiliations, it no longer matters that you have done a good job representing the network in your smaller community. All that matters is whether you own two or three VHF outlets in major television markets. And as far as the viewing public in smaller communities is concerned, they don't count at all. The only viewers who count live

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[31] The insulation of group owners from these adverse consequences is also illustrated in the Scripps/ABC affiliation deal. Scripps had lost Fox affiliations for its UHF stations in Phoenix, Tampa and Kansas City. It was able to acquire Phoenix and Tampa affiliations from ABC. However, the ABC Kansas City affiliation was held by Hearst Broadcasting Group, the owner of VHF ABC affiliates in Boston, Dayton, Kansas City, Milwaukee and Pittsburgh. Not surprisingly, Scripps did not acquire the ABC affiliation held by Hearst in Kansas City.

in New York, Los Angeles, Chicago, Philadelphia, San Francisco, Boston, Washington, Dallas-Ft. Worth, Detroit and Atlanta.

39. Even if the threat of disaffiliation were limited, as ABC's George Newi suggested, to affiliates having substantial amounts of duplicated service area, the number of potentially affected markets and stations is significant. Arnold Marfoglia was able to identify the following communities where ABC affiliates serve substantial common areas:[32]

(A) Station WEWS, Cleveland, Ohio and Station WAKC, Akron, Ohio;

(B) Station KGO-TV, San Francisco, California and Station KNTV, San Jose, California;

(C) Station WCVB-TV, Boston, Massachusetts and Station WMUR-TV, Manchester, New Hampshire;

(D) Station KCRG-TV, Cedar Rapids, Iowa and Station KDUB-TV, Dubuque, Iowa:

(E) Station WOAY-TV, Oak Hill, West Virginia and Station WCHS-TV, Charlestown, West Virginia;

(F) Station WMGC-TV, Binghampton, New York and Station WENY-TV, Elmira, New York;

(G) Station KQTV, St. Joseph, Missouri and Station KMBC-TV, Kansas City, Missouri; and

(H) Station WGGB-TV, Springfield, Massachusetts and Station WTNH-TV, New Haven, Connecticut.

40. Any way you view the current crisis in network/affiliate negotiations, many and perhaps most independently owned network affiliates are vulnerable to any major market group owner demanding their disaffiliation. This holds true whether or not the stated reason for disaffiliation is overlapping service areas. Affiliates in smaller communities are particularly vulnerable.

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[32] This is a list of ABC affiliates. It does not include other similarly situated affiliates of NBC, CBS or Fox.

41. The question arises, what can be done to improve Network Territorial Exclusivity Rule, so that residents of smaller communities can benefit from competition among stations for network programs? SBC submits that viewers in smaller communities can only be protected if each and every network affiliation decision is based solely on local factors existing in the community under consideration. The following improvements must be made in the Network Territorial Exclusivity Rule to stop the competitive abuses rampant in today's network affiliation process:

(a) The present Network Territorial Exclusivity Rule does not explicitly apply to networks. Since it takes an arrangement or understanding between a station and a network to violate the rule, all parties to the illegal arrangement or understanding, including networks, should be subject to the Rule's sanctions.

(b) Certain affiliation practices should raise a rebuttable presumption of a rule violation. One practice that should raise a rebuttable presumption of violation is where the network terminates an affiliation in a community without affiliating with another station in that community. This loss of local network service prima facie harms the public interest. Another instance where a rebuttable presumption of violation should apply is where the owner of major market stations (i) negotiates a multi-community affiliation deal that displaces network affiliates in one or more communities and (ii) the displaced stations have superior coverage to the group owner's local station such that there is a net loss of over-the-air Grade A or Grade B Network service area. Loss of network service to viewers is contrary to the public interest.

(c) Immediate discovery should be available to claimants establishing a prima facie violation of the rule. Network affiliation negotiations are conducted in private and it is rare that affected stations can obtain any access to the facts and circumstances surrounding their disaffiliation.

Discovery procedures similar to those provided in the connection with violations of the political rules' lowest unit charge requirements should be adopted for Network Territorial Exclusivity violations. See Potential Violations of Lowest Unit Charge Requirements, 6 FCC Rcd 7511, 7513-14 (1991). These procedures should permit depositions of persons negotiating potentially illegal affiliation agreements.

Conclusion

42. The Network Territorial Exclusivity Rule is critical to the survival of television stations in smaller communities. It protects viewers in these communities from withdrawal of the programming and financial support that makes free local over-the-air television news, weather and other local programming possible. In its present form the Network Territorial Exclusivity Rule is too weak to preserve free over-the-air local access to network programs in smaller (and even larger) communities. Recent changes in network affiliation practices responding to demands of major market television group owners threaten to undermine the scheme of local television broadcasting established in the Television Table of Allotments. The revisions to the Network Territorial Exclusivity Rule discussed above should materially improve its operation as an instrument to preserve competition